UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE CEMENT LEAGUE, and NORTHEAST REGIONAL COUNCIL OF CARPENTERS, and NEW YORK CITY AND VICINITY DISTRICT COUNCIL OF CARPENTERS (PARTY IN INTEREST)	NLRB Case No. 03-CA-126938

BRIEF OF NORTHEAST REGIONAL COUNCIL OF CARPENTERS IN OPPOSITON TO EXCEPTIONS

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PRELIMINARY STATEMENT

The General Counsel issued a complaint in the instant matter in response to a charge filed by the Northeast Regional Council of Carpenters ("NRCC"), alleging that The Cement League has maintained an unlawful hiring preference in its collective bargaining agreement with the New York City and Vicinity District Council of Carpenters ("NYC District Council"). A hearing on the NRCC's Unfair Labor Practice charge was held on March 25, 2015. Administrative Law Judge Raymond Green issued his decision on May 21, 2015 ("ALJ Decision"). Thereafter, the NYC District Council filed exceptions on July 2, 2015.

It is well settled that, under the Act, not only is a contractual preference based on union membership versus non-membership unlawful, but preferences granted on the basis of any membership considerations violate the Act. Regardless of how well intentioned the preference, the provisions of the National Labor Relations Act, impose constraints against favoring union members over nonmembers or members of other unions. See e.g. Newspaper and Mail Deliverers' Union of New York (New York Post), 361 NLRB No. 26 (2014).

In the instant case, it is undisputed that the contractual hiring provisions of The Cement League's collective bargaining agreement with the NYC District Council encourage the employment of members of the NYC District Council and provide a preference for the hiring of members of the NYC District Council, over the hiring of members of other Carpenters locals and councils, such as the NRCC. Accordingly, the Administrative Law Judge properly concluded that The Cement League's maintenance of the contractual hiring provisions under its collective bargaining agreement with NYC District Council violates Section 8(a)(1) of the Act.

In its exceptions, the NYC District Council does not dispute the Administrative Law Judge's conclusion that the membership preferences in its collective bargaining agreement with the Cement League violate the Act. Rather, the NYC District Council seeks the Board's deferral to the United States District Court's approval of the collective bargaining agreement, containing the unlawful hiring preferences. However, nothing in the record indicates either that the NYC District Council or the Cement League advised the Court of the unlawful nature of their agreed-upon hiring preference or that the District court considered the unlawful nature of the contractual hiring preference under the Act.

BACKGROUND

The Charged Party, The Cement League, is a multi-employer association of construction industry contractors operating in New York City. The Cement League has been signatory to a series of successive collective bargaining agreements with the NYC District Council, the latest of which were effective by their terms from July 1, 2006 to June 30, 2011 (GC-3) and from July 1, 2011 to June 30, 2015. (GC-2). (ALJ-1).[1] Individual employer-members of the Cement League also are party to collective bargaining agreements with the NRCC elsewhere in New York State and in New Jersey. (ALJ-5). Employer-members of the Cement League have traditionally and regularly employed steady crews of carpenters, who have included members of

[1] Since March 4, 1994, the NY City District Council has been operating under the terms of a Consent Decree, as a result of a civil RICO action in United States v District Council of New York City, Civil Action 90 Civ. 5722 (SDNY). The terms of the Consent Decree provide, inter alia, for Court approval of the NY City District Council's collective bargaining agreements with the multi-employer associations. Nothing in the Consent Decree binds the NRCC or the Board. In addition, the record does not indicate that the Consent Decrees requires adherence to the requirements of federal labor law. Cf. U.S. v. Teamsters, 948 F.2d 98,106 (2nd Cir. 1992), cert granted and vacated, 506 U.S. 802 (1992) ("requiring strict adherence to the requirement of federal labor policy in the enforcement of the Consent Decree").

the NRCC and its various local union affiliates, on jobs in New York City and elsewhere. (ALJ-1).

When NRCC members, employed by member-employers of the Cement League work in New York City, they are employed under the terms and conditions of employment set forth in The Cement League's collective bargaining agreement with the NYC District Council, receiving the same wages and other economic terms as members of the NYC District Council. (GC-2 and 3). However, the benefit fund contributions of NRCC members working for contractors in New York City are reciprocated back to the benefit fund affiliated with their home local unions and members receive health and welfare and pension benefits from the benefit funds affiliated with their home local unions. Id.

Traditionally, the successive NY City District Council collective bargaining agreements with the Cement League had provided employers with the right to select up to one-half of their workforce and to hire the remaining carpenters from the NY City District Council referral system. In this regard, the Cement League's Agreement, effective from July 1, 2006 to June 30, 2011, provided at Article VI, General Foreman- Foreman- Hiring Schedule, Section 2:

> The first Carpenter on the jobsite shall be referred by the Union. The second Carpenter shall be the Employer's selection. The balance shall be fifty (50%) percent from the Union and. fifty (50%) percent from the Employer.

(GC-3, p. 17). Id. On May 26, 2009, in United States v District Council of New York City, Civil Action 90 Civ. 5722 (SDNY), the Honorable Charles Haight issued an order modifying the contractual hiring ratio so that "the total carpenter workforce on a job site selected by a contractor shall not exceed 67%" with the "remaining 33% of the total carpenter workforce on a jobsite... assigned by the District Council from the Out of Work List." (JX-2). (ALJ-2).

Administrative Law Judge Green recognized that the successive Cement League Agreements provided for a non-exclusive hiring hall. (ALJ 1). The Cement League's Agreement, effective from July 1, 2006 to June 30, 2011, provided at Article VII, Job Referral System, Section 3:

> Carpenters will be hired by the job referral list at the District Council. The 50/50 rule will be enforced and the Contractor can hire whom he wants on his fifty (50%) percent ratio. The other fifty (50%) percent will come from the job referral list.

(GC-3, p. 19). As found by the Administrative Law Judge, under the traditional language of the Cement League's agreement with the NYC District Council, NRCC members could be retained by their employers, provided that they were matched by referrals from the NYC District Council hiring hall, without regard to union membership. (ALJ-1).

FACTS OF THE INSTANT CASE

Commencing in May, 2013, the NYC District Council negotiated modifications to their multi-employer association collective bargaining agreements to provide for "full mobility job hiring", which were approved by the United State District Court for the Southern District of New York. (JX-2). (ALJ-2). On October 3, 2013, the Cement League and the NYC District Council entered into a Memorandum of Agreement for a successor agreement which modified the traditional language of the Cement League agreement, at Article VI, General Foreman- Foreman-Hiring Schedule, to provide for "full mobility job hiring". Id. The Cement League Agreement, at Article VI, Section 2, was modified to allow the employer-members of the Cement League to select their own employees, following the hiring of the foreman and the shop steward. The Company's right to hire its own workforce, however, was conditioned on the requirement that each non-member of the District Council be matched one for one from the NYC District Council's referral hall:

> The first Carpenter on the jobsite shall be the Foreman and may be selected by the Employer. The second Carpenter on the job site shall be the Shop Steward referred by the Union. The remainder of the Carpenters shall be selected by the Employer. Any employees not members of the District Council shall be matched 1:1 from the District Council Job Referral List.

(JX-1, p. 5). (ALJ-3). The traditional language of Article VII, Job Referral System Non Discrimination Clause, Section 2, was modified to provide that, on jobs requiring one or two employees:

> [T]he Employer will be permitted to work without a certified shop steward without a time limitation. Any employee who is not a member of the District Council will be matched1:1 from the District Council's Job Referral List. The Union will assign one (1) of the (2) members with the duties of the shop steward.

(G.C.-2, p. 22). The foregoing modifications were incorporated into the text of the Cement League Agreement, effective from July 1, 2011 to June 30, 2015. (GC-2, p. 19). Id.

Under Article VI, Section 2 and Article VII, Section 2 of The Cement League Agreement, the employer-members of the Cement League can hire their entire workforce directly and enjoy full mobility, if they restrict their employment at jobsites to members of the NYC District Council and do not employ members of the NRCC or other non-members. The Cement League Agreement, at Article VII, Job Referral System Non Discrimination Clause, Section 5, reiterates that full mobility is available to the employer members of the Cement League, if its workforce is restricted to members of the District Council as provided elsewhere in the Agreement:

> Notwithstanding any other provisions of this Agreement, the Employer shall be permitted to hire any and all Carpenters, except for the Shop Steward and except as otherwise provided in Article VI, Section 2, without reference to hiring ratios (i.e., the Employer will be able to hire Carpenters, as specifically limited, under so-called full mobility).

(G.C.-2, p. 22). (ALJ-3).

The Agreement between the Cement League and the NYC District Council was approved

by the Honorable Richard M. Berman, on October 23, 2013, in United States v District Council of New York City, Civil Action 90 Civ. 5722 (SDNY). (JX-2). (ALJ-2). Nothing in the Court's Order or in the record at hearing indicates that the Court considered the issue in the instant case: whether the foregoing hiring provisions violated Section 8(a) (1) of the Act or were otherwise prohibited by the Act.

While not considered by the District Court, the recently negotiated Cement League Agreement contains a hiring preference for members of the NYC District Council and limits the employment opportunities of members of the NRCC, who work steadily for an employer-member of the Cement League. Specifically, if an employer-member of the Cement League wants to maintain a steady crew, and obtain the perceived economic benefits of "full mobility", an employer who employs only members of the NYC District Council needs only to limit its steady crew to members of the NYC District Council. However, if an employer employs a steady crew of carpenters who are members of the NRCC, in order to take advantage of "full mobility", the employer needs to have its steady crew transfer their union membership from the NRCC to the NYC District Council or to replace its steady crew of NRCC members, with a crew of NYC District Council members. By exclusively employing only members of the NYC District Council, Cement League members can maintain the full mobility of their steady workforce under the Cement League Agreement. (ALJ- 4 and 5). Thus, The Cement League Agreement creates an incentive to encourage NRCC members to transfer their membership into the NY City District Council, to protect their steady work opportunities with their employers, but at the cost of abandoning or limiting their benefits in the benefit funds sponsored by the NRCC. Neither The Cement League nor the NY City District Council advised Judge Berman that they were requesting him to approve an unlawful hiring preference.

THE ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge analyzed the instant matter consistent with the NLRB's longstanding recognition that, under the Act, the maintenance of contractual preferences based on union membership violates the Act. (ALJ-4). For example, Administrative Law Judge cited Plasterers' Local Union No. 32, 223 NLRB No. 59 (1976), in which the Board found a clause to be unlawful which required that at least 50 percent of the plasterers employed by the contractors must be members of the Local, "The wording of the disputed clause, without ambiguity, requires a signatory employer to give preference in employment to members of the Respondent Union over nonmembers. The mere maintenance of such an agreement violates the Act." See also Carpenters Local 2396 (Tri-State Ohbayashi), 287 NLRB No. 78 (1987); Local No. 121, Plasterers, 264 NLRB No. 29 (1982); Kvaerner Songer, Inc., 343 NLRB 1343 (2004); Operating Engineers Local 17 (Combustion Engineering), 231 NLRB 1287, 1289 (1977); Bricklayers Local 2 (Glenshaw Glass Co.), 205 NLRB 478, 481 (1973).

The Administrative Law Judge concluded that the Cement League Agreement contained an unlawful hiring preference by incentivizing carpenters to transfer their membership to the NY City District Council. The employer-members of the Cement League are permitted to select as many members of the NYC District Council as they want and can fill their entire complement of workers with NYC District Council members. However, if the employer employs a member of the NRCC or another Carpenters local or council, the NRCC members or non-NYC District Council member must be matched with a referral from the NYC District Council's hiring hall. Thus, an employer-member of the Cement League's hiring of NRCC members or other non-NYC District Council union members requires the hiring of an equal amount of District Council members from the hiring hall, disrupting an employer's maintenance of its steady crew of

carpenters.

In the instant case, the Cement League's collective bargaining agreement with the NYC District Council prohibits its employer-members from employing members of the NRCC or other Carpenters unions unless they are matched one for one with a referral from the NYC District Council. Thus, an employer-member of the Cement League, when working in New York City, is barred from employing its steady workforce unless it hires from the NYC District Council's hiring hall or induces its steady workforce to join an affiliate of the NY City District Council. In this regard, full mobility is allowed only if an employer exclusively employs members of the NYC District Council. Because the maintenance of the Agreement encourages the hiring of members of the NYC District Council over members of the NRCC and other Carpenter locals and councils, the Administrative Law Judge found that the Cement League has violated the Act. (ALJ- 4 and 5).

In its Exceptions, the NY City District Council did not dispute that the Cement League's maintenance of the membership-based hiring preferences at Article VI, General Foreman-Foreman- Hiring Schedule, Section 2, and Article VII, Job Referral System Non Discrimination Clause, Section 2, of its Agreement violates Section 8(a)(a) (1) of the Act.

THE BOARD SHOULD NOT DEFER ITS ENFORCEMENT OF THE ACT TO THE DISTRICT COURT'S ADMINISTRATION OF THE CONSENT DECREE

In its Exceptions, the NYC District Council argues that the Administrative Law Judge's Decision should be rejected and the Complaint dismissed because they are in conflict with the Orders of the District Court, including the Order approving The Cement League Agreement on October 23, 2013. (JX-2). However, as noted by the Administrative Law Judge, nothing in the Court's Order or in the record at hearing indicates that the Court considered the issue in the

instant case: whether the foregoing hiring provisions violated Section 8(a)(1) of the Act or were otherwise prohibited by the Act. Rather, the District Court's consideration of the Cement League Agreement was limited to whether it met the District Court's anti-corruption goals and was democratically ratified by the membership of the NYC District Council. Conspicuously absent from the Court's order is any consideration of 1) whether the Agreement unlawfully discriminated against NRCC members or other non-members of the NYC District Council or 2) whether the employer-members of the Cement League would circumvent the local hiring hall by the transfer of their steady workforces into membership in the NYC District Council.

The NYC District Council's submission of the decision of the District Court, dated April 27, 2015 (Exceptions, Ex. A), highlights the absence of any consideration by the District Court of the unlawful nature of the hiring preference in NY City District Council's multi-employer collective bargaining agreements. In the course of vacating an arbitration award, the Court noted a discussion of the two-man jobs provision, analogous to Article VII, Job Referral System Non Discrimination Clause, Section 2 of The Cement League Agreement:

> In discussing the parties' intention with respect to two man jobs, the Arbitrator stated:
>
> "The WCC acknowledges the DCC's reliance on statements made by John DeLollis, its Executive Director, to its delegates on July 25, 2012." [On that occasion, Mr. DeLollis stated that the two man provision in the MOU "keeps New York City carpenters working the two-man. An out-of-towner can't work that two-man job. It's got to be a New York City District Council Carpenter."

(Exceptions, Ex. A, p. 5, fn. 7). Thus, the District Court specifically cited the discriminatory purpose of the contractual two-man job rule to limit work to a "New York City District Council Carpenter," at the expense of "an out-of-towner", without any realization of the discriminatory motive inherent in the statement.

Similarly, the District Court, in support of its decision to vacate the arbitration award maintaining an International Agreement's provisions allowing non-members of the NY City District Council to work on two-man jobs, cited the following statements by the counsel, for the employer association and for the NY City District Council, during argument before the Court:

> The following colloquy occurred between the Court and Mr. Rosen, counsel for WCC, at a hearing on March 30, 2015: The Court: "You think there's no conflict between the two-man crew provisions of the two agreements?" Mr. Rosen: "The only difference, the only difference is the fact that under the International [Agreement] you could have two out-of-towners, whereas under the collective bargaining agreement, they both have to be the District Council."...According to James Murphy, District Council's counsel, "[u]nder the International Agreement, the contractor would be allowed to put on the job two people who are not members of the New York City District Council. That's the big difference..."

(Exceptions, Ex. A, p. 10, fn. 12). The District Court specifically cited the admission of the parties' counsel regarding discriminatory purpose of the contractual two-man job rule to limit work to members of the NY City District Council, without any consideration of the provision's discriminatory purpose.

The District Court has concurrent jurisdiction, to resolve issues arising under the Act, where they arise as collateral issues in lawsuits brought under other federal legislation. Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616, 626 (1975). Thus, a Court's deferral to the Board's resolution of NLRA charges is not mandatory, where a Section 301 suit over arbitration of a contractual grievance and pending charges before the Board present common issues. Local 884 Rubber Workers v. Bridgestone/Firestone, Inc., 61 F.3d 1347, 1356-57 (8th Cir. 1995); IBEW v. Hope Electrical Corp., 293 F.3d 409, 417-18 (8th Cir. 2002). Similarly, the Act does not preclude judicial enforcement of a federal criminal statute that independently prohibits conduct that is arguably prohibited by the NLRB. See U.S. v. Boffa, 688 F.2d 919, 930-931 (3rd Cir. 1982). Cf. Teamsters Local 372 v. Detroit Newspapers,

956 F.Supp. 753, 760-61 (E.D.Mich.1997); MHC, Inc. v. Mine Workers, 685 F.Supp. 1370 (E.D.Ky.1988). In U.S. v. Teamsters, 948 F.2d at 105-106, the Second Circuit held that the NLRB did not have exclusive jurisdiction over claims of nonemployee candidates for union office that their exclusion from Yellow Freight's premises violated union election rules promulgated pursuant to a RICO consent decree. The foregoing cases do not indicate, however, that the NLRB's jurisdiction to investigate and remedy unfair labor practices is ousted by concurrent federal district court jurisdiction over a collateral action.

Section 10(a) of the Act states that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." In exercising its exclusive jurisdiction under the Act, the Board has decided unfair labor practice issues in matters that involved RICO consent decrees, where those rulings have neither conflicted with, nor interfered with, the court proceedings in the RICO case. See e.g. United Parcel Service, 318 NLRB 778, enfd. 92 F.3d 1221 (D.C. Cir. 1996) (Board's decision that employer violated Section 8(a)(1) was reached after court officer under consent decree concluded that the same conduct violated the election rules, and after district court dismissed employer's post-election appeal as moot because the RICO remedies were limited to the campaign period). In Tri-County Roofing, Inc., 311 NLRB 1368 (1993), the NLRB independently adjudicated hiring hall violations against a union operating under District Court supervision following litigation under RICO:

> We also acknowledge the existence of and our review of the civil RICO case involving Local 30. U.S. v. Roofers Local 30, 686 F.Supp. 1139 (E.D.Pa. 1988), affd. 871 F.2d 401 (3d Cir. 1989), cert. denied 110 S.Ct. 363 (1989). We find that the RICO case and the decision of Judge Louis Bechtle do not preclude our decision here but in fact bolster the need for our Order and notice.

Id. at fn. 1.

In the context of administering the Consent Decree in in United States v District Council of New York City, Civil Action 90 Civ. 5722 (SDNY) (JX-2), the District Court did not litigate the issue of whether the hiring provisions of The Cement League Agreement violated federal labor law and did not make any factual findings with respect to the discriminatory impact of the hiring preferences. Neither the NLRB nor the NRCC were parties to the proceedings. See e.g. U.S. v. Teamsters, 964 F.2d 180 (2nd Cir. 1992). While the Court approved The Cement League Agreement, it did not rule on the issue presented by the charge and did not apply federal labor law. The NY City District Council's reliance on U.S. v Teamsters, 776 F.Supp. 144, 151 (S.D.N.Y. 1991) (citing to the "Yellow Freight" decision ultimately vacated by the Supreme Court at 506 U.S. 802 (1992)) and U.S. v Teamsters, 808 F.Supp. 276, 278 (S.D.N.Y. 1992) is misplaced. In both decisions, the District Court applied the precepts of the Act in the context of civil RICO litigation. In the 1991 "Yellow Freight" decision, the Court balanced the employer's property rights and the union members' Section 7 access rights to the employer's property, consistent with the Act. In the 1992 U.S. v Teamsters decision, the District Court applied the Board's case law allowing a union to lawfully diminish or terminate a former member's seniority rights in response to misconduct. In both decisions, the District Court considered and applied the Act in an effort to achieve strict adherence to the requirement of federal labor policy in the enforcement of the Consent Decree at issue.

In the instant case, the District Court did not consider the unfair labor practice issue or apply the Act to the hiring preferences in The Cement League Agreement. Rather, in its Order of October 23, 2013, the District Court merely approved the proposed collective bargaining agreement as consistent with the Consent Decree's provisions on anti-corruption and because it was democratically ratified by the NY City District Council's membership. In the absence of the

District Court's consideration of the unfair labor practice issue, there is no danger of an inconsistent ruling in the instant case. A decision by the Board finding the hiring preferences to be unlawful would merely require the parties to return to the bargaining table, subject to the Court's jurisdiction under the Consent Decree to approve a subsequent collective bargaining agreement, which does not provide a hiring preference to NYC District Council members and does not discourage the employment of NRCC members and other non- NYC District Council members.

THE DISCRIMINATORY HIRING PREFERENCES CANNOT BE JUSTIFIED BY THE ASSERTED ANTI-CORRUPTION PURPOSE

In its Exceptions, the NYC District Council seeks to justify the hiring preferences in The Cement League Agreement on the basis that they have an anti-corruption purpose. In support of the hiring preferences, the NYC District Council argues that the purpose of the new language of Article VI, Section 2 and Article VII, Section 2 is to mandate that, in addition to the Shop Steward, there are carpenters on the job who have a stake in ensuring that the contractual wages and benefits are paid on all hours worked. The merits of the argument, depend on acceptance of the dubious assumption that NYC District Council members are less corruptible than other carpenters, an assumption which seems to be more dubious in light of the history of corruption which resulted in the District Court's intervention over the administration of the NYC District Council's collective bargaining agreements. In addition, given the lack of record evidence of the training of rank and file carpenters in the anti-corruption compliance mechanism or time-keeping, there is even less support for the anti-corruption justification for the union membership based hiring preference. However, the Board has traditionally refused to consider the underlying purpose of a discriminatory hiring preference. See e.g. Newspaper and Mail Deliverers' Union of New York (New York Post), supra.

Regardless of the merits of the anti-corruption purpose espoused by The Cement League and the NYC District Council, the espoused anti-corruption purpose does not require a preference based on union membership and could be met by a preference for local employees. The Board has recognized the lawfulness of contractual provisions which encourage local hiring, without discriminatorily favoring the employment of union members. For example, the Board has upheld contractual provisions which provide protection to employees of an employer whose employment with an employer originated locally within a union's territorial jurisdiction or to workers working in a local area, all of whom would have "skin in the game" and a stake in maintaining area wage and benefits. See e.g. Operating Engineers, Local 562 (Ralph A. Marino), 151 NLRB 497, 500 (1965), Bricklayers Local 28 (Plaza Builders), 134 NLRB 751 (1961); Laborers, Local 673 (Perini Corporation), 171 NLRB 894 (1968); Carpenters, Local 1849, 161 NLRB 424 (1966).

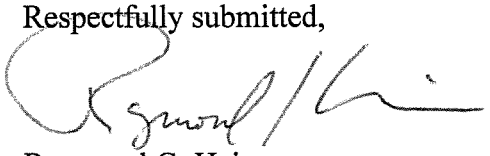
The foregoing hiring provisions, found lawful by the Board, would protect the anti-corruption purpose espoused by the NYC District Council to the same extent as the challenged contractual provisions, without violating the Act. Unlike the challenged provisions of the Cement League Agreement, the provisions approved by the Board do not rely on union membership in establishing hiring ratios or portability. Rather, mobility and hiring are based on whether an employee's employment with the employer originated locally or on the extent that a worker works in the local area. Thus, the asserted anti-corruption purpose of The Cement League and the NYC District Council could lawfully be accommodated within the parameters of the Act.

Under these circumstances, the Board should reject the asserted anti-corruption purpose as justifying the unlawful hiring preference in The Cement League Agreement.

CONCLUSION

For the forgoing reasons, the Board should set reject the NYC District Council's exceptions and affirm the Administrative Law Judge's conclusions that the challenged hiring provision's in The Cement League's Agreements are unlawful and that the Cement League's continued maintenance of the provisions, as alleged in the Complaint and underlying Unfair Labor Practice charge, violates Section 8(a)(1) of the Act.

Respectfully submitted,



Raymond G. Heineman

Dated: July 16, 2015

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 16, 2015, he caused a true and accurate copy of these Exceptions, together with a copy of this Certificate, to be served upon the following:

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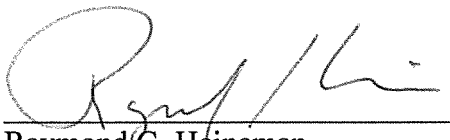
I am aware that I subject to punishment if any of the forgoing statements made by me are willfully false.



Raymond G. Heineman

Dated: July 16, 2015